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Michael R. Gallagher

Alton L. Stephens

RECENT DEVELOPMENTS IN AVIATION CASE LAW

BY MICHAEL R. GALLAGHER* AND ALTON L. STEPHENS**

I. INTRODUCTION

THIS ARTICLE is a survey of aviation cases decided in 1977. Its purpose is to acquaint the reader with a variety of cases spanning the spectrum of aviation law and which may be of some practical interest to attorneys; it is not intended to be a comprehensive treatment of any of the specific aspects of aviation law presented. The cases discussed below fall into six general categories:

1. products liability;
2. pilots' negligence;
3. air carriers' liability to passengers for personal injury or property damage under the contract of carriage, applicable tariffs and the Warsaw Convention;
4. air carriers' liability to passengers for "overbooking";
5. the necessity, or lack thereof, of a causal relation between exclusions in aviation insurance policies and a claimed loss for which coverage is denied; and
6. miscellaneous.

These aviation law topics are representative of those addressed by federal and state courts during 1977. Obviously, not every significant case or topic is considered in this paper, but an effort has been made to include cases with practical significance to most attorneys whose practice includes aviation matters.

While many of the cases included here represent a change in direction or recognize a trend or resolve issues of first impression, many are consistent with earlier cases and are included because they confirm earlier positions or are simply interesting; some cases

* J.D., Univ. of Mich., Attorney at Law, Cleveland, Ohio.

** J.D., Northern Ky. St. Univ., Attorney at Law, Cleveland, Ohio.

are included only because they represent diametrically opposed resolutions of the same issue. Altogether, we have selected some thirty-one cases for discussion.

II. PRODUCTS LIABILITY

A seller of a product is strictly liable in tort for personal injury or property damage resulting from the use of his product, if the product was unreasonably dangerous and in a defective condition at the time of sale.[1] It is widely recognized that misuse of the product is a defense to a strict liability action, provided the misuse is unforeseeable.[2] Usually whether a particular misuse is unforeseeable is a question of fact, but in *Kay v. Cessna Aircraft Co.*,[3] the U.S. Court of Appeals for the Ninth Circuit held as a matter of law that plaintiff's decedent, the pilot of a Cessna Model 337 "push-me/pull-me" aircraft, had unforeseeably misused the aircraft by failing to follow operating instructions in the owner's manual. The instructions, if followed, would have alerted him to the fact that the rear engine had failed before he commenced his fatal takeoff attempt. Plaintiff's theories of recovery were that Cessna's instructions were inadequate or, in the alternative, that even if adequate, failure to comply with them was a foreseeable misuse of the aircraft. The court allowed that the instructions could have been more clearly drafted, but held that compliance with them would have averted the accident and that the decedent pilot's failure to perform the indicated pre-takeoff procedures was not reasonably foreseeable to Cessna. The court thereupon affirmed a judgment notwithstanding the verdict entered by the trail court in Cessna's favor.

While the issue was not addressed by the court in *Kay v. Cessna*, it could have just as easily been held that the decedent pilot's conduct was contributory negligence as a matter of law. It seems to be a generally accepted proposition that contributory negligence is no defense to a strict liability claim unless such negligence is the sole proximate cause of the loss. In fact, contributory negligence *is* a defense to strict liability claims *unless*

[1] RESTATEMENT [SECOND] OF TORTS, § 402A (1965).

[2] *See, e.g.*, 63 AM. JUR. 2d *Products Liability* §§ 52, 136 (1972).

[3] 548 F.2d 1370 (9th Cir. 1977).

"such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence,"[4] regardless of whether it is the sole proximate cause. In *Kay v. Cessna*, the pilot was negligent not because he failed to discover a defect, but because he failed to exercise ordinary care for his own sofety in his manner of operating the aircraft.[5]

In order to prevail under a strict liability theory, Section 402A of the Restatement (Second) of Torts, adopted by most jurisdictions recognizing the strict liability in tort doctrine, requires one to prove, among other things, that the offending product was "unreasonably dangerous." Most courts enforce this requirement,[6] although some have eliminated it.[7] The U.S. Court of Appeals for the Tenth Circuit had occasion to consider the question in *Rigby v. Beech Aircraft Corp.*,[8] and held that the trial court did not err in instructing the jury that any defect in the subject Beech Baron aircraft had to render it "unreasonably dangerous" before Beech could be held liable for wrongful death, personal injuries and destruction of the aircraft. Defects in design and construction were alleged to have led to fuel starvation and the crash of the aircraft. The district court, sitting in Utah, based its decision on Utah law. Since Utah had neither adopted nor rejected the doctrine of strict liability in tort, the court was required to determine the probable resolution of the issues should they be litigated in state courts. In upholding the trial court's decision to charge on the "unreasonably dangerous" requirement, the court observed that cases eliminating the requirement are against the weight of authority,[9] and held that if faced with the same question, the Utah state courts would require proof that the aircraft was "unreasonably dangerous" as a prerequisite to Beech's liability. The court thereupon affirmed the trial court's entry of judgment for defendant Beech Aircraft Corporation.

[4] RESTATEMENT [SECOND] OF TORTS, § 402A, comment n (1965).

[5] *Cf.* West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Butaud v. Suburban Marine, 555 P.2d 42 (Alas. 1976); Hoelter v. Mohawk Service, Inc., 365 A.2d 1064 (Conn. 1976).

[6] 63 AM. JUR. 2d *Products Liability* § 129 (1972).

[7] *See, e.g.*, Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alas. 1973); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (Cal. 1972); Glass v. Ford Motor Co., 304 A.2d 562 (N.J. 1973).

[8] 548 F.2d 288 (10th Cir. 1977).

[9] *Id.* at 291.

The California Supreme Court case of *Barker v. Lull Engineering Co.*,[10] decided in January, 1978, although involving a high lift loader, deserves special comment because of the effect it will undoubtedly have on the liability of aircraft manufacturers in California and in other jurisdictions rejecting the "unreasonably dangerous" requirement. The *Barker* case analyzed the basis of liability for design defect, and held that a product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) if the benefits of the challenged design are outweighed by the risk of danger inherent in such design. The court clearly states that once the plaintiff proves that the product's design proximately caused his injury, then the burden shifts to the defendant manufacturer to prove that, on balance, the benefits of the challenged design outweighed the risks of the design.

The strict liability doctrine as set forth in Restatement (Second) Torts, Section 402A, purports to apply only to *sellers* of an offending product; Sections 407 and 408 address the question of a *lessor's* liability to users of a leased product, in terms of the "dangerousness" of the product and the lessor's negligence. But a substantial number of courts have imposed Section 402A strict liability on lessors of defective products.[11] A recent case in the aviation context is *Rudisaile v. Hawk Aviation, Inc.*[12] Plaintiff's decedent leased from defendants an aircraft from which defendant (a commercial lessor of aircraft) had drained the oil without replacing it. The decedent did not check the oil level prior to takeoff. Shortly after takeoff, the engine failed resulting in the crash of the aircraft and decedent's death. The New Mexico court, relying on the New Mexico Supreme Court case of *Stang v. Hertz*,[13] held that Section 402A strict liability principles governed defendant's liability. The decedent's asserted contributory negligence in failing to check the oil level was therefore not available as an affirmative defense, and plaintiff prevailed. The *Rudisaile* case follows *Stang v. Hertz* without discussing the merits of applying the strict liability doctrine

[10] 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

[11] Annot., 52 ALR 3d 121 (1973).

[12] 14 Av. Cas. 17,713 (N.M. Dist. Ct. 1977).

[13] 83 N.M. 730, 497 P.2d 732 (1972).

to lessors. This and its status as a trial court decision diminish its significance.

An interesting products liability question is whether a contractual disclaimer of warranty (i.e., an "as is" sale) can operate to absolve the seller of strict liability in tort. In *Mid-Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*,[14] the Texas Court of Civil Appeals had occasion to consider the question as one of first impression. One Robert Hawkins, an FAA certificated engine mechanic, performed a major overhaul on a Piper Pawnee agricultural aircraft owned by Bobby Shivers. Hawkins made a test flight after completing the work, and duly certified the engine to be in airworthy condition. Shivers later sold the aircraft "as is" to defendant-appellant Mid-Continent Aircraft Corporation. Plaintiff-Appellee, Curry County Spraying Service, then purchased the aircraft from Mid-Continent, with knowledge that the aircraft had been purchased by Mid-Continent from Shivers, that Mid-Continent had not performed any work on the engine and that Mid-Continent was selling the aircraft in the same condition as it was purchased from Shivers. Shortly after Curry purchased the aircraft, the engine quit in flight. Curry County Spraying brought an action for property damage to the aircraft and for loss of its use against Mid-Continent, Shivers, and Hawkins.

The theories of recovery were based on negligence, breach of implied warranty, and strict liability in tort. The trial court found that the engine was in an unreasonably dangerous and defective condition at the time of the sale to Curry, the defect being the absence of a crankshaft gear bolt lock plate and arising as the result of Hawkins' sole negligence. Shivers and Mid-Continent argued that the "as is" nature of their sale contracts exempted them from liability under both the implied warranty and strict liability theories. The court agreed with respect to the implied warranty theory, but held that Mid-Continent and Shivers were liable to Curry under the strict liability theory, for both economic loss (i.e., lose of use) and physical damage to the aircraft itself. (Economic loss is *not* an item of damage enumerated in Section 402A.)

The court observed first that under "solidly established" Texas law, "privity of contract is required before one may recover for

[14] 553 S.W.2d 935 (Tex. Civ. App.—Amarillo 1977), *rev'd*, 21 Tex. S. Ct. J. 481 (July 12, 1978), *noted*, 44 J. AIR L. & COM. 207 (1978).

an economic loss—e.g., loss of use of the product, loss of bargain —and, therefore, the law of sales rather than the rule of strict liability applies [citations omitted]."[15] As a result, the "as is" nature of the sale would have been sufficient to exclude liability for economic loss, but the issue was foreclosed because it was not raised on appeal.

The court next considered the question of whether Curry's claim for physical damage to the aircraft itself was to be governed solely by the law of sales or whether the strict liability doctrine also applied. The court commented:

> Evident from the development of the law is that the Uniform Commercial Code (contract) law and the Restatement (Second) of Torts § 402A (tort) rule of strict liability co-exist in Texas to serve different functions. Code law, whose statutory language makes no reference to tort law in connection with products liability, concerns itself with the quality of product by establishing standards of merchantability and fitness for a particular purpose. The rule announced by § 402A, accompanied by comment n stating that the rule is not governed by the provisions of the Uniform Commercial Code, concerns itself with safety standards by imposing strict liability upon one who sells an unreasonably dangerous product which causes physical harm. *The considerations supporting either of the principles are not affected by the considerations underlying the other, and the standards of quality of a product, with the attendant risk of the bargain, are entirely distinct from its standards of safety, with a possible unreasonable risk of harm. It follows that a violation of the standards of safety which results in physical harm to the unreasonably dangerous product itself subjects the seller to the tort rule of strict liability.* This rule has been proclaimed in other jurisdictions.[16]

The court then came directly to grips with the issue of what effect, if any, the "as is" language of the sales contract had upon Mid-Continent's strict liability to Curry, observing:

> [W]e see no sound reason why knowledgeable parties of equal bargaining strength should not also be free, in negotiating the sale and purchase of a secondhand product, to define their scope of responsibility for physical harm to the product itself. Agreements between the buyer and the seller to limit or exonerate the seller's tort liability for product defects are accorded validity elsewhere.[17]

[15] 553 S.W.2d at 939.
[16] *Id.* at 940 (emphasis added).
[17] *Id.* at 941.

The court went on to hold that since there was no explicit agreement exonerating Mid-Continent from strict tort liability to Curry, Mid-Continent was strictly liable to Curry for the physical damage to the aircraft. There was no personal injury claim in *Mid-Continent v. Curry*, and it is therefore silent on the issue of whether a seller can exculpate himself from strict liability in tort for personal injury suffered by a user or consumer with whom he has privity of contract.

A well-reasoned dissent argued that physical harm to a product itself, resulting from a defect in the product, is essentially an unfulfilled commercial expectation and does not come within the policy justification for § 402A strict liability.[18]

Another case dealing with the kind of harm encompassed within the doctrine of strict liability in tort is *Saxton v. McDonnell Douglas Aircraft Co.*,[19] which addresses the question in terms of duty and foreseeability. Plaintiff was the estate of Betty Kween, deceased. Betty Kween had herself been a plaintiff in a wrongful death action against the same two defendants, McDonnell Douglas and General Dynamics, arising out of the "Paris Air Crash," a DC-10 accident occurring on March 3, 1974, and which resulted in the deaths of Betty Kween's son and his wife. Betty Kween's case was evidently the first Paris Air Crash case to proceed to trial. In early 1976 it resulted in a plaintiff's verdict in the amount of $1,509,-950.00. On June 28, 1976, Betty Kween committed suicide. For its claim arising out of her suicide, Betty Kween's estate set forth the following theories of recovery: (1) products liability; (2) defendant's improper conduct toward Betty Kween in deposition and in trial; and (3) improper use of the trial itself as a "test case," in that defendants made an unreasonably low settlement offer. Defendants' acts were said to have been willful and malicious, all leading to Betty Kween's irresistible urge to commit suicide, a foreseeable event within the risk of harm reasonably to be perceived by the defendants.

On defendants' motion to dismiss for plaintiff's failure to state a recognizable claim, the court first considered the scope of defendants' duty to decedent Betty Kween, relying heavily on the

[18] *Id.* at 942-43.

[19] 428 F. Supp. 1047 (C.D. Cal. 1977).

case of *Dillon v. Legg*.[20] The California Supreme Court in *Dillon v. Legg*, dealing with liability for personal injury resulting from the shock of a third person's death, and the court of appeals in *Archibald v. Braverman*,[21] dealing with the same subject, set forth the following requirements for recovery: (1) a close relation between plaintiff and the decedent; (2) "nearness" or proximity to the fatal event; and (3) contemporaneous observance of the event or its shocking aftermath. These factors were applied in *Krouse v. Graham*,[22] to the effect that a prerequisite to liability is a physical injury resulting from a "[d]irect emotional impact from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurence."[23] The court then went on to hold as a matter of law that Betty Kween's suicide failed to come within these requirements and was simply too "remote and unexpected" to permit recovery, and thereupon granted defendants' motions to dismiss with respect to all theories of recovery.

Saxton v. McDonnell Douglas represents a reaffirmation of the principle of *Dillon v. Legg* applied in a strict liability context. That is, while it may not be necessary to establish negligence in order to prevail against the manufacturer of a defective product, it remains a requirement that the defendant manufacturer first owe a duty to the plaintiff with respect to the plaintiff's harm. If such harm would fall outside the risk in a negligence case, then it is also outside the risk in a strict liability case.

III. PILOTS' NEGLIGENCE

Aviation accident cases in which a pilot is either a plaintiff or defendant are greatly influenced by ordinary negligence principles. But unlike most ordinary negligence cases, the standard of care to which a pilot is subject is codified at length in the Federal Aviation Regulations (FARs)[24] promulgated by the Administrator of the Federal Aviation Administration pursuant to the Federal

[20] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
[21] 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).
[22] 57 Cal. App. 3d 752, 129 Cal. Rptr. 624 (1976).
[23] 57 Cal. App. 3d at 771, 129 Cal. Rptr. at 637.
[24] 14 C.F.R. §§ 61.1-.201, 91.1-99.49 (1977).

Aviation Act of 1958.[25] If a pilot is a plaintiff in either a products liability action against a seller or in an ordinary negligence action against, for instance, another pilot or an air traffic controller (under the Federal Tort Claims Act[26]), or if a pilot is a defendant in an ordinary negligence action arising out of an aircraft accident, one of his most immediate concerns had better be his compliance, or lack thereof, with *all* applicable FARs. Most FARs governing aircraft operation are so specific that their violation can lead not merely to a finding of a pilot's negligence, but to a holding that the pilot was negligent *per se*, thereby precluding the issue of his negligence as a matter of law.[27]

Several cases decided in 1977 involved the alleged negligent failure of air traffic controllers to issue wake turbulence warnings to pilots encountering wake turbulence.[28] Two of them held the pilots involved to be negligent *per se* by virtue of their operation of the aircraft they were flying in violation of certain FARs, thereby barring their recoveries altogether.

In *Jenrette*,[29] plaintiff's decedent was the pilot of a Piper Cherokee, a light single engine general aviation aircraft, which encountered the wake of a Boeing 737, a twin-engine commercial jet, and crashed as a result, allegedly because of the negligence of an air traffic controller. The Boeing 737 was on final approach to landing, ahead of and below the Cherokee. Weather conditions were VFR.[30] Under such circumstances, the Boeing 737 had the right of way over the Cherokee.[31] In VFR conditions, it is the

[25] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1970), *formerly* Civil Aeronautics Act 1938, ch. 601, 52 Stat. 973.

[26] 28 U.S.C. § 1346(b) (1970).

[27] *See generally* Gallagher & Stevens, *General Aviation Pilots, Federal Aviation Regulations, and Negligence Per Se*, 19 FOR THE DEFENSE 195 (1978) [hereinafter cited as Gallagher & Stevens].

[28] *See*, Jenrette v. United States, 14 Av. Cas. 17,798 (C.D. Cal. 1977); Kack v. United States, 432 F. Supp. 633 (D. Minn. 1977); Dickens v. United States, 545 F.2d 886 (5th Cir. 1977); Neal v. United States, 562 F.2d 338 (5th Cir. 1977).

[29] Jenrette v. United States, 14 Av. Cas. 17,798 (C.D. Cal. 1977).

[30] Visual Flight Rules (VFR) weather minimums are set forth in 14 C.F.R. §§ 91.105, 91.107 (1977).

[31] 14 C.F.R. § 91.67(f) (1977) provides:

> (f) *Landing.* Aircraft, while on final approach to land, or while landing, have the right of way over other aircraft in flight or operating on the surface. When two or more aircraft are approaching an

legal obligation of the pilot of an aircraft to "see and avoid other aircraft" and, if another aircraft has the right of way, "to give way to that aircraft" and refrain from passing "over, under or ahead of it, unless well clear."[32] The obligation imposed under this FAR includes the obligation to avoid wake turbulence encounters with other aircraft.[33] The court implicitly held that the decedent pilot had violated 14 C.F.R. Section 91.67(a) in failing to avoid the Boeing 737's wake turbulence, and that violation of FAR's is negligence as a matter of law. But the court did not dwell on this point, evidently because it also held the air traffic controller not to be guilty of negligence in failing to issue a wake turbulence warning. (A deficiency all too evident in opinions wrestling with FAR's is the failure of court and counsel to fully articulate the negligence *per se* argument, or to even cite the specific FAR involved. This criticism is applicable to *Jenrette.*)

Another of the wake turbulence cases, *Kack v. United States*,[34] is likewise deficient in the articulation of its conclusion that the crash of a light aircraft in VFR conditions was caused by the pilot's negligence in failing to stay above the flight path of a preceding large aircraft on its final approach, and that the air traffic controller was not negligent in failing to issue a wake turbulence warning. The court could have based its conclusion on 14 C.F.R. Section 91.67, but did not do so explicitly.

A recurrent theme in defense of pilots' suits against air traffic controllers is that the pilot and not the air traffic controller "is directly responsible for, and is the final authority as to, the operation of" his aircraft. This is the language of 14 C.F.R. Section 91.3

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airport for the purpose of landing, the aircraft at the lower altitude has the right of way, but it shall not take advantage of this rule to cut in front of another which is on final approach to land, or to overtake that aircraft.

[32] 14 C.F.R. § 91.67(a) (1977) provides:

(a) *General.* When weather conditions permit, regardless of whether an operation is conducted under Instrument Flight Rules or Visual Flight Rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft in compliance with this section. When a rule of this section gives another aircraft the right of way, he shall give way to that aircraft and may not pass over, under, or ahead of it, unless well clear.

[33] Wasilko v. United States, 300 F. Supp. 573 (N.D. Ohio 1967), *aff'd*, 412 F.2d 859 (6th Cir. 1969).

[34] 432 F. Supp. 633 (D. Minn. 1977).

(a), and it was used in *Kack*, though without citation of its source. (In fact, there was no explicit citation to any FAR in *Kack*.) This particular regulation seems rarely to be the *basis* of a court's decision; it is usually added as additional justification for a conclusion already reached by the court.

The remaining two wake turbulence cases, *Dickens*[35] and *Neal*,[36] are ones in which the government was held liable for the negligence of its air traffic controllers. Their conclusions appear superficially to conflict with the conclusions of *Jenrette* and *Kack*, but they can be reconciled without much difficulty. In *Dickens*, plaintiff's decedent was a passenger aboard an aircraft encountering wake turbulence generated by a Braniff jet, so he himself was not contributorily negligent. In order to deny his estate recovery, the court would have to find either that there was *no* neglience on the part of the air traffic controllers, or that the pilot's negligence was the *sole* proximate cause of the crash. (The issue of the pilot's negligence, if any, was not addressed by the court). Another factor distinguishing *Dickens* is that the accident aircraft was not following the Braniff jet on its approach but was approaching a runway intersecting the runway upon which the Braniff jet had just landed. Therefore, it was not the pilot's responsibility to maintain separation from the Braniff jet under 14 C.F.R. Section 91.67; it was the air traffic controller's responsibility to maintain the necessary separation. *Neal* can also be reconciled with the other wake turbulence cases in that the accident in *Neal* occurred under Instrument Flight Rules (IFR) weather conditions, which is to say that the pilots were unable to visually maintain separation and had to rely on air traffic control.

The midair collision is another class of cases in which FAR's play an important role. One such case decided in 1977, and denying recovery to pilots' estates on the ground that their violation of certain FAR's was negligence *per se*, is *Rudelson v. United States*.[37] In this case, two of the plaintiffs were the estates of deceased pilots, one operating a Cessna 150 and the other a Piper Colt. A midair collision between them occurred at 9:00 a.m. under VFR conditions, while both aircraft were on the downwind leg of the

[35] Dickens v. United States, 545 F.2d 886 (5th Cir. 1977).
[36] Neal v. United States, 562 F.2d 338 (5th Cir. 1977).
[37] 431 F. Supp. 1101 (C.D. Cal. 1977).

approach pattern for Runway 21 at the Santa Monica Airport. A student pilot, Rudelson, was aboard the Cessna 150. The plaintiffs claimed that the Santa Monica tower controllers were negligent in failing to advise each aircraft of the other's proximity. Under California's comparative negligence doctrine,[38] the court held the United States to be twenty percent negligent, the Piper pilot to be forty-five percent negligent, the Cessna pilot to be twenty-five percent negligent, and Rudelson to be ten percent negligent. The pilots were held negligent *per se* for violating 14 C.F.R. Sections 91.65(a),[39] 91.67(a)[40] and 91.87(b).[41] *Rudelson* is significant because of its explicit holding that the violation of an FAR is negligence *per se* and because of its lucid application of the FAR's involved to the facts of this case. *All* the cases cited on this subject are significant to the extent that they amount to a judicial determination that specific FAR's satisfy the requirements of the negligence *per se* doctrine.[42]

Three other 1977 cases holding that a pilot's violation of specific FAR's is negligence *per se* are *Wood v. United States*,[43] *Todd v. United States*,[44] and *Florida Freight Terminals, Inc. v. Cabanas*.[45] In *Wood*, plaintiffs were the estates of the pilot and passengers aboard a Piper Cherokee that crashed in IFR conditions about fifteen minutes after a VFR takeoff from Van Nuys, California. The

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[38] Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[39] 14 C.F.R. § 91.65 (1977) provides:

> (a) *Operating near other aircraft.* No person may operate an aircraft so close to another aircraft as to create a collision hazard.

[40] *See* note 32 *supra.*

[41] 14 C.F.R. § 91.87 (1977) provides:

> (b) *Communications with control towers operated by the United States.* No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. However, if the aircraft radio fails in flight, he may operate that aircraft and land if weather conditions are at or above basic VFR weather minimums, he maintains visual contact with the tower, and he receives a clearance to land.

[42] For a complete discussion of the negligence *per se* doctrine as it applies to FARS see Gallagher and Stephens, *supra* note 27.

[43] 14 Av. Cas. 17,821 (C.D. Cal. 1977).

[44] 384 F. Supp. 1284 (M.D. Fla. 1975), *aff'd*, 553 F.2d 384 (5th Cir. 1977).

[45] 14 Av. Cas. 18,335 (Fla. Dist. Ct. App. 1978).

pilot was VFR-rated only, and was aware of the possibility of IFR conditions along his proposed route because he had consulted the local FAA Flight Service Station before departure. Even had he not, he would be charged with knowledge of the weather conditions under 14 C.F.R. Section 91.5, which imposes the following specific requirement of conduct on him: "Each pilot in command shall, before beginning a flight, familiarize himself with all available information concerning that flight. This information must include: (a) for a flight under IFR or a flight not in the vicinity of an airport, weather reports and forecasts . . ." This VFR pilot, who was prohibited from operating his aircraft in IFR conditions by 14 C.F.R. Section 61.3(e),[46] nevertheless elected to proceed with the flight, deliberately entering IFR conditions. A crash resulted, killing all aboard. The plaintiffs' theory of recovery is not clear from the court's opinion, but the court disposed of the case on defendant's Fed. R. Civ. P. 41(b) motion for involuntary dismissal by holding as a matter of law that the sole proximate cause of the crash was the pilot's negligence. The pilot was held to be negligent *per se* for violating 14 C.F.R. Section 61.3(e), prohibiting him from flying in weather conditions below VFR minimums as set forth in 14 C.F.R. Section 91.105.

The court also held that the pilot was negligent as a matter of law (as opposed to negligent *per se*) for violating 14 C.F.R. Section 91.9, finding that the pilot and not air traffic control was ultimately and solely responsible for the operation of his aircraft under 14 C.F.R. Section 91.3(a).[47] The prohibition of 14 C.F.R. Section 91.9 is that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." Since this FAR does not impose a *specific* requirement of conduct, its violation cannot be negligence *per se*. But where the facts are such, as here, that reasonable minds could reach no conclusion

[46] 14 C.F.R. § 61.3(e) (1977), *Instrument Rating*, provides:

> No person may act as pilot in command of a civil aircraft under instrument flight rules, or in weather conditions less than the minimums prescribed for VFR flight [in 14 C.F.R. Sections 91.105 and 91.107] unless—(1) in the case of an airplane, he holds an instrument rating.

[47] 14 C.F.R. § 91.3 (1977), *Responsibility and authority of the pilot in command*, provides:

> (a) The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.

other than that the pilot's conduct was "careless or reckless," then violation of the regulation can be held negligence as a matter of law.

Todd v. United States[48] is another case in which a pilot's failure to familiarize himself with all available information concerning his flight, in violation of 14 C.F.R. Section 91.5, was held negligence *per se* barring his estate from any recovery to which it might otherwise be entitled. The decedent, an instrument rated pilot, commenced his descent for landing in severe IFR conditions, in known mountainous terrain, without having familiarized himself with the terrain features, and crashed into a mountain. The court held that while the United States was also negligent in certain particulars, the pilot's *per se* negligence precluded any recovery.

And finally, the most recent case, *Florida Freight Terminals, Inc. v. Cabanas*,[49] held that failure to tie down or secure a cargo is a violation of the FAR's and constitutes negligence *per se*.

These cases, taken together, have a significance beyond their individual facts, demonstrating that the Federal Aviation Regulations are an extremely potent weapon directed at pilots involved in aircraft accidents. In fact, it probably is not an overstatement to say that in virtually every aviation accident case, the FAR's can be made to play a substantial role by an attorney familiar with them and the related case law.

IV. Air Carriers' Liability to Passengers

The cases discussed under this heading are concerned with air carriers' liability to passengers under contracts of carriage, including applicable tariffs, and the Warsaw Convention. The Warsaw Convention governs claims arising out of international air carrier operations, and some of the 1977 cases construing it will be discussed first.

Reed v. Wiser[50] is a case arising out of the crash at sea of TWA Flight 841 bound from Tel Aviv to New York on September 8, 1974. Under Article 22 of the Warsaw Convention, TWA would be absolutely liable for the deaths of the passengers aboard Flight

[48] 384 F. Supp. 1284 (M.D. Fla. 1975), *aff'd*, 553 F.2d 384 (5th Cir. 1977).

[49] 14 Av. Cas. 18,335 (Fla. Dist. Ct. App. 1978).

[50] 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, ___ U.S. ___, 98 S. Ct. 399 (1977) *noted*, 44 J. Air L. & Com. 175 (1978).

841, but in an amount limited to $75,000 per passenger absent a showing of willful misconduct. Instead of suing TWA, however, the plaintiffs sued various corporate officers individually, alleging that they negligently failed to prevent the placing on Flight 841 of a bomb which, upon exploding, caused the crash. Defendants raised as a defense the liability limitation of Article 22 and the plaintiffs' motion to strike the defense was granted. The trial court certified to the Second Circuit Court of Appeals the question whether the liability limits of Article 22 applied to actions against individual officers and employees of an air carrier. The court of appeals observed first that there was a conflict among decisions at the district court level, and then proceeded to consider the arguments advanced in favor of affirming the trial court's decision.

One of those arguments was that the United States had not ratified the Hague Protocol of 1955, which, *inter alia*, expressly stated that the liability limits applied to a carrier's servants and agents. The court disposed of this argument by saying:

> We believe this reliance [on the refusal of the United States to ratify the Hague Protocol] on the part of the district court to be misplaced, since the refusal to ratify the Protocol was due to the United States' dissatisfaction with an entirely different aspect of the Protocol—its failure to provide a sufficient increase in the liability limits—rather than to its application of these limits to a carrier's employees.[51]

The court concluded that the purpose of Article 22 was to fix at a definite level *the cost to airlines* of damages sustained by their passengers *and of insurance to cover such damages.* In overturning the lower court's decision, the court said,

> The district court's decision, forsaking one uniform rule governing the limits of employee liability, would raise the very real prospect that in future international air disaster cases the plaintiffs would seek to circumvent the Convention's limitation by bringing suit against the pilot or some other employee of the airline involved, thus requiring the court to determine what domestic law applies and whether under that law recovery might be had for an amount greater than that recoverable against the airline. Indeed, in one lawsuit just commenced in New York seeking $4.5 million for the death of a passenger killed in the recent collision of two Boeing 747 planes in the Canary Islands, the plaintiffs have taken the cue

[51] 555 F.2d at 1086.

> from the district court's decision here and joined one of the pilots as a codefendant. If this method of circumventing the Convention's liability limitation is accepted, not only will the purpose of defining the limits of the carrier's obligations be circumvented, but in the process the Convention's most fundamental objective of providing a uniform system of liability and litigation rules for international air disasters will be abandoned as well. It is difficult to imagine an interpretation more at odds with the acknowledged purposes of the Convention than that for which appellees press.[52]

The significance of this decision is apparent. A federal court of appeals has now held that the liability limitations of the Warsaw Convention apply to employees of air carriers as well as to the air carriers themselves, thereby preventing the circumvention of the limitation by suing airline employees directly. The court aptly observed that the Warsaw Convention is the supreme law of the land, and that any modification of its application or effect is preeminently a matter for the executive and legislative branches of government, not for the courts.

Another significant Warsaw Convention case is *Karfunkel v. Compagnie Nationale Air France*,[53] which arose in New York from the hijacking of an Air France flight enroute from Tel Aviv to Paris, and its diversion to Entebbe Airport in Uganda, where its passengers and crew were later rescued in a military operation mounted by Israeli forces. Plaintiffs' claim was for bodily injury and false imprisonment, and was founded on diversity of citizenship. Air France raised three affirmative defenses based on the Warsaw Convention, and moved the court to dismiss the claim against it for lack of jurisdiction over the subject matter. Plaintiffs moved to strike the affirmative defenses. The issue before the court was basically jurisdictional: was plaintiffs' claim cognizable under the Warsaw Convention? If so, then jurisdiction would be proper *only* in France or Israel, under Article 24 of the Convention. The court held it was and dismissed the action against Air France.

Article 17 of the Convention imposes liability on an air carrier for "bodily injury" to a passenger if an "accident" causes damage to him aboard the aircraft. On the basis of previously decided

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[52] *Id.* at 1092.

[53] 14 Av. Cas. 17,674 (S.D.N.Y. 1977).

authorities, the court first held that the "hijacking" was an "accident" within the meaning of Article 17, and then turned to the question of whether a claim for false imprisonment came within the meaning of "bodily injury." Plaintiffs argued that mental anguish is not specifically included in the language of Article 17 and thus could not be the basis for any claim based on the Convention. The court rejected the argument, observing that the Warsaw Convention does not *create* claims for relief but merely establishes procedural rules governing substantive claims created by local law, and cited in support New York and California district court authority. The court acknowledged that other trial courts had reached a contrary result, but preferred the reasoning that "[a]ll claims for damages for personal injuries suffered by a passenger in an 'accident,' whether physical or mental, be resolved in one action under the Convention."[54]

Plaintiffs also argued that their action was exempt from the Warsaw Convention under its Article 34, which provides that "[t]his convention shall not apply . . . to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business." While this argument had superficial plausibility to commend it, the court concluded that the *diversion* by hijacking of a flight *commenced* in the ordinary course of business could not amount to such extraordinary circumstances as are contemplated by Article 34. The court said, "Article 34 was not intended to exclude from the Convention any regularly scheduled flight on which an abnormal event prevents completion; such a construction would render the Convention meaningless."[55]

A state court trial level case decided in 1977 interpreting Article 17 is *Beck v. KLM Royal Dutch Airlines*.[56] Plaintiff there alleged psychic trauma only, without an accompanying bodily injury claim. The court granted the airlines' motion for summary judgment, and based on existing New York authority, held that "[w]ithin the meaning of this Treaty, a *solely* psychic trauma is not 'bodily' injury."[57] This case is not inconsistent with *Karfunkel v. Air France* for the reason that there was no physical injury claim made here

[54] *Id.* at 17,678.

[55] *Id.*

[56] 14 Av. Cas. 18,210 (N.Y. 1977).

[57] *Id.* at 18,211 (emphasis added).

as there was in *Karfunkel*. There was therefore no need to consider any separation of claims such as would have resulted in *Karfunkel* had the court held that mental anguish was not bodily injury within Article 17. In many states, of course, a psychic injury can be a cognizable claim only if accompanied by physical injury, and perhaps *Karfunkel* and *Beck can* be reconciled on this basis as well.

Two other Warsaw Convention cases are of interest. These are *Maugnie v. Compagnie Nationale Air France*[58] and *Evangelinos v. Trans World Airlines*[59] which deal with the meaning of "disembarkation" and "embarkation," respectively.

The court in *Maugnie* held that an Air France passenger who had deplaned and had proceeded through a common passenger corridor to board another air carrier's flight had completed disembarkation of the Air France flight within Article 17 of the Warsaw Convention. On this basis, the court affirmed the dismissal of plaintiff's claim for bodily injury sustained in a slip and fall in the common corridor.

Evangelinos held that TWA passengers assembled in TWA's transit lounge in Athens, Greece preparatory to boarding its Flight 881 to New York were in the process of embarking when terrorists suddenly attacked them, and reversed the partial summary judgment entered by the trial court dismissing plaintiff's claim under Article 17 of the Warsaw Convention.

Three rather routine air carrier cases not involving the Warsaw Convention are worthy of brief mention here. The first is *Delta Air Lines v. Isaacs*.[60] Plaintiff Isaacs made a lost baggage claim of $750 against defendant Delta Air Lines, which denied the claim. Isaacs then brought suit to recover the $750 plus punitive damages and attorney's fees. The basis of plaintiff's claim for punitive damages and attorney's fees was Delta's alleged willful and unwarranted obstinance in dealing with his claim. The court refused to charge the jury that Delta's *total* liaiblity was limited to $500 by its Tariff No. PR-6, Section 370-A, purporting to so limit its liability for lost baggage. (Air carrier tariffs duly filed with the Civil Aeronautics Board have the force and effect of law,

[58] 14 Av. Cas. 17,534 (9th Cir. 1977).
[59] 550 F.2d 152 (3rd Cir. 1977).
[60] 141 Ga. App. 209, 233 S.E.2d 212 (1977).

and are not merely part of the contract of carriage.[61]) The jury returned a verdict for Isaacs awarding $500 actual damages, $750 punitive damages and $500 for attorney's fees. On Delta's appeal, the court of appeals held that it was not error for the trial court to refuse to charge that Delta's total liability was limited to $500, for the reason that while plaintiff's claim based on Delta's breach of its bailment contract was limited by the applicable tariff, plaintiff's claim based on Delta's conduct toward him following the loss was an independent action not subject to the tariff. The court then held that the award for attorney's fees was proper but that the award for punitive damages could not be sustained because no compensatory damages for Delta's conduct had been awarded. Under Georgia law, punitive damages must be predicated on an award of compensatory damages.

Another baggage loss case is *Nylen v. Delta Air Lines*,[62] in which plaintiff was a passenger on one of defendant's flights. Upon arrival at his destination, plaintiff was unable to locate his baggage and immediately notified defendant of its loss. Plaintiff completed a lost baggage report form presented to him by defendant and returned it to defendant's agent, apparently thinking that he had done whatever it was necessary to do to protect his interests. When after several months, plaintiff's luggage still had not been found, he sought reimbusement from the company for his loss. His claim was denied on the ground that he had not made a *claim* for his loss within the forty-five day period prescribed in Tariff No. PR-6 (Rule 40-B) for such losses. That is, the form he had prepared at the time of his loss was said to be nothing more than a "notice of loss" and was not a "notice of claim" within the meaning of the tariff. On the reverse side of the form was the following: "[This] report alone does not constitute a claim. . . . Industry tariffs require that you protect the validity of this loss or damage report by writing a letter of claims to the company within 45 days." The court viewed the issue before it as one of the "reasonableness" of the two step claim procedure. The court distinguished cases suggesting that the issue should be resolved in favor of the traveler, saying:

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[61] *See, e.g.*, Blair v. Delta Airlines, 344 F. Supp. 360 (S.D. Fla. 1972), *aff'd*, 447 F.2d 564 (5th Cir. 1973).

[62] 14 Av. Cas. 17,927 (Mass. Dist. Ct. 1977).

> [N]otwithstanding this body of precedent, if there is a rational purpose for the procedures established by Delta and if adequate steps are taken to insure that the public, with even a modicum of vigilance, may be apprised of these procedures, then the procedure at issue should not be lightly set aside.[63]

Delta's avowed purpose for the procedure was to give it an opportunity to investigate in the event lost baggage did not appear shortly (i.e., within seven days) after the flight (as it usually does). The court held this purpose to be rational, and then held that Delta's "notice of loss" form sufficiently apprised plaintiff of the claim procedure to be followed in the event his baggage was not recovered within seven days. The court thereupon affirmed the trial court's judgment for Delta. Since air carrier tariffs have the force of federal law, they operate to supplant contrary local laws—this particular tariff had the effect of imposing a forty-five day "statute of limitations" on lost or damaged baggage claims as well as a two-tiered claim procedure.

Tait v. Steinbugler[64] is a case concerned with the extent of an air carrier's duty to protect its passengers from assaults by fellow passengers. While a passenger on an Allegheny Airlines flight, plaintiff was threatened with assault by a fellow passenger (Steinbugler). Plaintiff informed Allegheny of Steinbugler's threat, and was in fact assaulted by Steinbugler in the airport parking lot after disembarking from the aircraft. On defendant Allegheny's motion to dismiss, plaintiff argued that whether Allegheny's duty to him extended to protecting him from assault in a parking lot which it did not own was a question of fact for the jury. The court disagreed, saying that while an air carrier has a duty to transport its passengers to their terminus and to furnish a safe place to alight and a safe means of egress, it would be an unwarranted imposition as a matter of law to oblige Allegheny to patrol a parking lot it does not own. The court granted Allegheny's motion on this basis.[65]

V. Air Carriers' Liability to Passengers for "Overbooking"

On April 28, 1972, Ralph Nader was denied boarding on an Allegheny Airlines flight for which he held a confirmed reservation.

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[63] *Id.* at 17,930.

[64] 14 Av. Cas. 17,865 (S.D.N.Y. 1977).

The boarding denial resulted from Allegheny's practice of "overbooking" its flights in anticipation of confirmed reservation "no-shows." The amount by which Allegheny (and other airlines) overbooked its flights was determined on a statistical basis. In 1973, Nader and the Connecticut Citizens Action Group (CCAG), allegedly damaged as a result of Nader's delayed arrival at his destination, filed an action against Allegheny, claiming intentional misrepresentation and seeking compensatory and punitive damages.[66] The court awarded Nader $10.00 in compensatory damages and $25,000 in punitive damages, and awarded the CCAG $51.00 in compensatory damages and $25,000 in punitive damages. On appeal, the court reversed and remanded on the basis that the case should be stayed until the CAB could administratively determine whether Allegheny's overbooking practice was deceptive, that the CCAG had no standing, and that before awarding punitive damages, the trial court should have found that Allegheny was acting in bad faith when it denied Nader his confirmed seat.[67] Nader was granted certiorari to the United States Supreme Court which reversed the court of appeals, saying that Nader's federal court action need not be stayed pending an administrative determination by the CAB, and ordering the trial court to determine whether Allegheny had acted in good faith.[68] In January, 1978, the trial judge (Charles Richey) awarded Nader $15,000 in compensatory and punitive damages and found that Allegheny's overbooking practice was fraudulent and wanton.[69] The judge found that Allegheny violated the non-discrimination provision of the Federal Aviation Act (49 U.S.C. Section 1374(b)) and that its failure to disclose its overbooking practices was a fraudulent misrepresentation of the meaning of "confirmed reservations." No award was entered for the CCAG, as the court of appeals ruling that it had no standing had not been disturbed by the Supreme Court.[70]

Another alleged overbooking case is *Burke v. Eastern Airlines,*

[65] *Cf.* Maugnie v. Cie. National Air France, 14 Av. Cas. 17,534 (9th Cir. 1977).

[66] Nader v. Allegheny Airlines, 365 F. Supp. 128 (D.D.C. 1973).

[67] Nader v. Allegheny Airlines, 512 F.2d 527 (D.C. Cir. 1975), *ev'd on other grounds,* 426 U.S. 290 (1976).

[68] Nader v. Allegheny Airlines, 426 U.S. 290 (1976).

[69] [1978] Av. L. Rep. (CCH) ¶ 18,312 (D.D.C. 1978).

[70] *Id.*

Inc.[71] Plaintiffs brought their actions under Section 404(b) of the Federal Aviation Act[72] in which they alleged that they had confirmed reservations on one of defendant's flights, that their flight had been "overbooked," that defendant had fraudulently represented to them that they had confirmed seats, and that defendant was negligent in operating its computerized reservation system. Plaintiffs asserted "federal question" jurisdiction under 28 U.S.C. Section 1331 and jurisdiction under 28 U.S.C. Section 1337, which confers federal jurisdiction over any action arising under an Act of Congress regulating commerce. Defendant Eastern Airlines moved to dismiss the action for lack of jurisdiction.

The court first observed that an implied private right of action exists under 49 U.S.C. Section 1374(b) for an air carrier's unreasonable prejudice or unjust discrimination against any person, but went on to say that the overbooking practice itself is not *per se* actionable under Section 1374(b). It is only when the air carrier has violated its own prima facie non-discriminatory priority rules that an action under Section 1374(b) arises. Thus, the following allegations are necessary and sufficient to invoke jurisdiction under Section 1374(b): (1) plaintiff possessed confirmed reservation; (2) plaintiff was entitled to a designated priority under the carrier's rules as approved by the CAB; and (3) the carrier boarded persons with lower priority.

Defendant Eastern's motion to dismiss went not to the sufficiency of plaintiffs' jurisdictional allegations, but to the impossibility of proving that they indeed had confirmed reservations, and was therefore more in the nature of a partial motion for summary judgment than a motion to dismiss for lack of subject matter jurisdiction. Under Rule 60(j) of CAB General Tariff No. 142, a space "on a given flight is [confirmed] when the availability and allocation of such space is confirmed by a reservations agent of the carrier *and entered into the carrier's electronic reservations system.*"

[71] 14 Av. Cas. 17,776 (N.D. Ga. 1977).

[72] 49 U.S.C. § 1374(b) (1970) provides:

> No air carrier or foreign carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Eastern introduced computerized business records establishing that plaintiffs did *not* hold confirmed reservations on the subject flight, and were therefore entitled to no boarding priority whatever. Plaintiffs ineffectively attempted to controvert Eastern's records, and the court granted Eastern's motion to dismiss. Plaintiffs' remaining claims were common law claims not alone cognizable in a federal court, and they were dismissed as well.

Joining Nader in victory was Mr. Smith in the most recently reported case of *Smith v. Piedmont Aviation, Inc.*[73] The court found that the air carrier's boarding passengers on a first-come-first-serve basis when its own published priority rule provided for a date-of-booking basis constituted unreasonable discrimination and supported compensatory damages. The court found, however, that the carrier's conduct did not warrant punitive damages.

In *Wilensky v. Olympic Airways*,[74] plaintiffs sought to maintain a class action under Fed. R. Civ. P. 23(a)[75] and 23(b)(3)[76] on behalf of a class of 2,083 persons who held confirmed reservations but were denied passage because of lack of space on Olympic Airways flights from New York to Athens, Greece during the period from February 21, 1973 through February 19, 1975, into which class plaintiffs fell. Defendant opposed class action certification.

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[73] [1978] 3 Av. L. Rep. (CCH) ¶ 18,327 (5th Cir. 1978).

[74] 14 Av. Cas. 18,034 (E.D. Pa. 1977).

[75] Fed. R. Civ. P. 23(a) provides:

> *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[76] Fed. R. Civ. P. 23(b) provides:

> (3) The court finds that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. (Emphasis added)

Count I of plaintiffs' complaint alleged violation of 49 U.S.C. § 1374(b),[77] Count II alleged breach of the contract of carriage, and Count III alleged fraudulent misrepresentation. Punitive damages were sought as well.

The court applied the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3) to all three counts of the complaint, and denied class action certification. With respect to Count I, the court held that it would have to make a determination in each individual case of whether the defendant followed its own priority rules in denying boarding before it could conclude that individual had been discriminated against under 49 U.S.C. Section 1374(b). As a result, the court could not find the existence of common questions of law and fact under Rule 23(a). Further, the court held that even if Rule 23(a) could be satisfied, the "predominance requirement" of Rule 23(b)(3) could not be satisfied, for any common questions were clearly subordinate to the questions of fact entailed in the necessary individual inquiries.

Similarly, with respect to Counts II and III, the court held that individual inquiries were necessitated, and that they predominated over common questions. For instance, in Count III (fraudulent misrepresentation) it would be necessary to determine whether each member of the class had relied on the representation, and it would be necessary to determine just what was the substance of the representation, if any, made to each member of the class. Likewise with respect to the claim for punitive damages, it would be necessary to establish that defendant's conduct toward each individual in the class was activiated by malice or evil motive. Accordingly, the court denied class action certification.

VI. The Necessity of a Causal Relation Between Exclusions in Aviation Insurance Policies and a Claimed Loss for Which Coverage is Denied

South Carolina Insurance Co. v. Collins[78] was a declaratory judgment action arising out of the crash of an aircraft piloted by one Metz Collins, defendant's decedent, in which a passenger, Wesley Nesbitt, was injured. Nesbitt brought a personal injury action against Collins' estate. South Carolina Insurance Company, which

[77] *See* note 72 *supra.*

[78] 237 S.E.2d 358 (S.C. 1977).

insured Collins under an aircraft liability policy, refused the defense of Nesbitt's action on the ground that at the time of the accident, Collins was not covered because his medical certificate had expired. Paragraph 7 of the policy declarations provided that Collins could operate the aircraft only if he had valid and effective pilot and medical certificates. Paragraph 25 of the policy conditions recited that the policy declarations were representations made by Collins and that the policy was issued in reliance on them.

The South Carolina Insurance Company's declaratory judgment action sought a determination that there was no coverage for the accident under the policy. For purposes of the declaratory judgment action only, it was stipulated that there was no causal relation between the crash and Collins' failure to have an effective medical certificate. Although there was no South Carolina authority on point relative to aviation liability insurance policies, the South Carolina Supreme Court concluded that a line of cases dealing with automobile liability and life insurance policies was dispositive of the issue before it. Since that line of cases required that a causal connection be established, and since none was, the court affirmed the trial court's order that coverage attached.

One of the cases relied upon by the South Carolina Supreme Court[79] involved a life insurance policy providing that "[t]his policy does not cover . . . loss sustained by the insured . . . while committing some act in violation of law." The insured was killed while riding on the running board of a truck in violation of a city ordinance, but defendant had shown no causal connection between that fact and the insured's death. The court held that in order to avoid coverage, the insurer was required to show such a causal connection, and thereupon reversed the granting of a directed verdict for the defendant insurer on that basis.

The insurer's position in these cases is that the ambit of the risk for which coverage is provided is defined by the terms and conditions of the policy. If the total risk inherent in a given activity for which there would otherwise be coverage exceeds or is outside the scope of the risk defined by the policy, then by the very provisions of the policy, there is simply no coverage in the first instance. This, it is argued, should be true regardless of whether

[79] Reynolds v. Life & Cas. Ins. Co., 166 S.C. 214, 164 S.E. 602 (1932).

the particular risk which actually causes the loss would, standing alone, come within the risk defined by the policy. A corollary to this argument is that the insured, by engaging in risk-generating activity outside the risk defined by his policy, is simply outside the scope of its coverage. If a pilot wants insurance coverage for, say, operating an aircraft for which he is not rated or without a current medical certificate, he must expect to pay a premium commensurate with the totality of the risk and if he proceeds to operate an aircraft without first having obtained such coverage, he should not be heard later to complain. This is all simply to say that the question of coverage *vel non* should be one capable of determination at the *outset* of the activity, and not one to be determined only *after* a loss has occurred.

A case articulating this point of view well is *Insurance Co. of North America v. Lympal, Inc.*,,[80] a declaratory judgment action addressing precisely the same issue as that in *South Carolina Insurance Co. v. Collins.* In holding that the insured pilot's failure to have a current medical certificate as required under the terms of the insurance policy barred coverage, irrespective of a causal relation between such failure and the crash, the court quoted approvingly from *Baker v. Insurance Co. of North America*[81] as follows:

> An insurance policy is a contract. In this one the parties expressly 'agreed that coverage provided by this policy with respect to any aircraft specifically and individually described therein shall not apply while such aircraft is in flight unless the pilot in command of the aircraft is properly certificated . . .' *The clear meaning of this language is not that the risk is excluded if damage to the aircraft is CAUSED by a failure of the pilot to be properly certificated but that risk is excluded if damage occurs WHILE the aircraft is being flown by a pilot not properly certificated.*[82]

The court then said, referring to *Baker*, "[*Baker*] went on to hold that the failure to comply with the Federal Regulations need not be the cause of the crash, but simply under the clear terms of the exclusion coverage simply did not exist."[83]

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[80] [1978] 3 AV. L. REP. (CCH) ¶ 18,067 (Tenn. Ct. App. 1977).

[81] 10 N.C. App. 605, 179 S.E.2d 892 (1971).

[82] *Id.* at 894 (emphasis added).

[83] *Id.*

A case consistent with *Insurance Co. of North America v. Lynpal* is *Macalco, Inc. v. Gulf Insurance Co.*,[84] a declaratory judgment action in which the defendant denied liability coverage for an aircraft crash under the following exclusion: "This policy does not apply . . . while the aircraft is in flight and . . . operated by a student pilot unless such flight . . . is with the specific advance approval of and under the supervision and control of an FAA Certificated Commercial Instructor Pilot." At the time of the crash, the aircraft involved was being operated by a student pilot in violation of the above exclusion. The trial court decided against Gulf on several grounds, one of which was a lack of causal connection between the fact that the pilot was a student pilot and the happening of the crash. On appeal, the trial court was reversed. With respect to the "causal connection" requirement, the court said,

> Courts of high authority have held that in policies (phrased to exclude certain activities) there is no need of any causal nexus between the injury or death and the forbidden forms of conduct. *While the proscribed activity continues, the insurance is suspended as if it had never been in force.*
> The contract terms govern with no need to show some additional element . . . and such remains the rule so long as the exclusion is plain and unambiguous.
> . . . .
> In aircraft insurance cases, many jurisdictions have expressly rejected any causation requirement while enforcing excluded uses.[85]

The *Macalco* court, in a lengthy opinion, comprehensively discusses the effect to be given exclusions in aviation liability policies, and their construction with other provisions in the policy. It is well worth reading.

With this, we have completed the discussion of 1977 aviation cases falling into easily definable subject matter areas. There remain to be considered, however, a few cases which may be of more limited interest and of a miscellaneous nature.

VII. Miscellaneous Cases

Virtually every aviation accident is investigated by either the

[84] 550 S.W.2d 883 (Mo. App. 1977).

[85] *Id.* at 892 (citations omitted; emphasis added).

National Transportation Safety Board (NTSB) or the FAA. The NTSB investigates principally fatal aviation accidents. In every case, an official investigation report is prepared. If a particular accident leads to litigation, the question of the limits on use of the official accident report naturally arises. Resolution of the question is not nearly so simple as one might suppose. A preliminary distinction must be made between the factual accident investigation report and the NTSB's probable cause report, for NTSB rules[86] permit its investigators to testify with respect to their factual report, but not with respect to the Board's probable cause report. This is to say that an NTSB investigator cannot give opinion or expert testimony. The same is generally true with respect to FAA investigators as well.[87] These prohibitions apply regardless of whether the investigator's testimony is taken for discovery or trial purposes.[88]

A 1977 case concerned with the use of an FAA accident report is *Roberts v. Morey Airplane Co.*[89] At issue was defendant's motion *in limine* to exclude from plaintiff's evidence a series of four FAA accident reports. Relying on the statutory section governing use of *NTSB reports*,[90] the court granted the defendant's motion. It is arguable that the court's reliance on 49 U.S.C. Section 1441 (e) was misplaced, because an FAA report is not an NTSB report and there is no comparable statute expressly precluding the introduction of FAA reports into evidence. However, FAA accident investigations are made at the request and on behalf of the NTSB, and it seems sound they should be clothed with the same protection afforded NTSB reports. Since the four reports appeared to relate to other accidents, a sounder basis for exclusion would be immateriality, and Section 1441(e) may be of questionable applicability since it refers to the admissibility of reports in actions grow-

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[86] 14 C.F.R. §§ 835.1-835.9, issued pursuant to 49 U.S.C. § 1441(e) (1970), providing:

> No part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

[87] 14 C.F.R. § 9.1-.17 (1977); 49 U.S.C. § 1657 (1970).

[88] Kline v. Martin, 345 F. Supp. 31, 32 (E.D. Va. 1972).

[89] [1978] 3 Av. L. Rep. (CCH) ¶ 17,784 (Wis. Cir. Ct., Dane Cty. 1977).

[90] *See* note 86, *supra.*

ing out of matters mentioned in such reports.[91]

One of the many important documents in aircraft litigation is the airframe log book, which reflects maintenance, repairs, and compliance with 100 hour and annual inspection requirements. An aircraft may not be operated except in accordance with the requirements of all applicable airworthiness directives,[92] which set forth procedures to be followed to remedy an "unsafe condition" in an aircraft.[93] In *United States v. Airways Service, Inc.*,[94] a district court held that "compliance with A.D.'s [airworthiness directives] must be set out *explicitly* [in the airframe log book] rather than subsumed into a 100 hour or other inspection."[95] It is the routine of many aircraft service and repair shops to state in a conclusory manner that all airworthiness directives through a particular number have been complied with in conjunction with a log book entry reflecting performance of a 100 hour inspection and a certification that the aircraft is airworthy. *United States* imposes a greater duty.

The last case to be discussed here is *San Diego Unified Port District v. Superior Court*.[96] In an underlying "inverse condemnation" case against the San Diego Port District, some homeowners sought recovery on theories of nuisance, negligence, and trespass. among others, alleging damage done by the noise of aircraft operations at San Diego International Airport. The state trial court overruled San Diego's general demurrer, and San Diego petitioned for a preemptory writ in the court of appeals. The court of appeals denied the petition, observing that the allegations in the complaint were sufficiently broad to state a cause of action. The court ordered, however, that any recovery be limited to those damages arising out of the operation of the airport itself, and not include any recovery for damages caused by aircraft in flight. The court's reasoning on this point was that the field of aircraft noise regulation had been preempted by the federal government, and that

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[91] *See* note 86, *supra*.

[92] 14 C.F.R. § 39.3 (1977).

[93] 14 C.F.R. § 39.1 (1977).

[94] 429 F. Supp. 843 (N.D. Iowa 1977).

[95] *Id.* at 846 (emphasis added).

[96] 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (1977), *cert. denied*, ___ U.S. ___, 98 S. Ct. 184 (1977).

flights complying with federal laws and regulations (as the subject flights evidently did) could not be classified as constituting negligence, nuisance or trespass; in contrast, the alleged tortious management of the airport facilities themselves was a stated cause of action that had not been preempted by federal law. Contrast *Morris v. Ciborowski,*[97] where recovery of damages for overflights as well as for management of the airport was permitted.[98]

VIII. CONCLUSION

At the outset of this paper, the reader was cautioned not to expect to be educated in depth. We have intended to acquaint the attorney having some interest in aviation matters with areas of activity in federal and state courts in 1977. One subject we avoided, partly because of its specialized character and partly because of the volume of material involved, was the litigation between British Airways and Air France on one side, and the Port Authority of New York and New Jersey on the other, arising out of the refusal of the Port Authority to permit test flights of the Concorde supersonic airliner to and from John F. Kennedy International Airport after such flights had been federally approved. For those interested in tracing the course of this litigation, see *British Airways v. Port Authortiy of New York & New Jersey.*[99]

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[97] 113 N.H. 563, 311 A.2d 296 (1973).

[98] *See generally* Annot., 79 A.L.R.3d 253 (1977).

[99] British Airways v. Port Auth. of N.Y. & N.J., 431 F. Supp. 1216 (S.D.N.Y. 1977), *rev'd,* 558 F.2d 75 (2d Cir. 1977), *on remand,* 437 F. Supp. 809 (S.D.N.Y. 1977), *aff'd & modified,* 564 F.2d 1002 (2d Cir. 1977).